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SEP 19 1994

In the Matter of

**Petition on Behalf of the
Louisiana Public Service
Commission for Authority to Retain
Existing Jurisdiction over
Commercial Mobile Radio Services
Offered Within the State of
Louisiana**

PR File No. 94-SP5

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

To: The Commission

COMMENTS OF RADIOFONE, INC.

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Dated: September 19, 1994

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SUMMARY

Radiofone, Inc. (Radiofone) submits these comments concerning the Petition filed by the Louisiana Public Service Commission (LPSC) to retain its regulatory authority.

The LPSC has historically used its broad powers vested under the United States Constitution, the Communications Act of 1934 (as amended), Louisiana statutes and its Constitution to protect consumers and commercial mobile radio service providers from unreasonable and discriminatory rates and practices.

Radiofone respectfully submits that these LPSC activities, and the competitive CMRS market which it regulates, meet the standards of the United States Constitution, Section 332(c)(3) of the Communications Act of 1934, as amended (the Act), 47 U.S.C. § 332(c)(3), and justify the retention of its existing authority.

Radiofone disagrees, however, with the LPSC's suggestion that it may extend any form of rate of return regulation to CMRS providers. Such regulation is inappropriate for a competitive marketplace, and it has not been justified pursuant to the standards set forth in Section 332(c)(3) of the Act, 47 U.S.C. § 332(c)(3), and Section 20.13 of the Commission's Rules, 47 C.F.R. § 20.13.

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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Commission for Authority to Retain)
Existing Jurisdiction over)
Commercial Mobile Radio Services)
Offered Within the State of)
Louisiana)

To: The Commission

COMMENTS OF RADIOFONE, INC.

Radiofone, Inc. (Radiofone), by its attorneys, respectfully submits these comments concerning the above-captioned Petition filed by the Louisiana Public Service Commission (LPSC), as listed in State Petitions to Retain Authority over Intrastate Mobile Service Rates, 59 Fed. Reg. 42,595, 42,595 (1994) (Public Notice).

Radiofone supports the LPSC's request for authority to continue its existing regulation of commercial mobile radio services (CMRS) providers. Radiofone opposes the imposition of any form of rate of return regulation for CMRS providers, as signalled in the LPSC's petition, because such regulation is inappropriate. To date, the LPSC has admittedly not imposed rate of return regulation in any form.

In support of these comments, the following is respectfully shown:

I. INTEREST OF RADIOFONE

Radiofone provides one-way (paging) and two-way (cellular) mobile services in Louisiana.

Radiofone presently holds LPSC issued certificates for the provision of all forms of

CMRS in Louisiana. Radiofone is the cellular licensee for frequency block A in New Orleans, Louisiana MSA, Louisiana 8 - St. James RSA, Louisiana 9 - Plaquemines RSA, and Louisiana 6(A2) - Iberville RSA. Radiofone has controlling interest in Baton Rouge Cellular Telephone Company Partnership, which is the frequency block A licensee in the Baton Rouge, Louisiana MSA. Radiofone also has controlling interest in Houma Thibodaux Cellular Partnership, which is the frequency block A licensee in the Houma-Thibodaux, Louisiana MSA.

As shown in the Petition, the LPSC has historically used its broad powers vested under the United States Constitution, Louisiana statutes and its State Constitution to protect consumers and CMRS providers. These powers have been exercised to prevent the imposition of discriminatory charges against customers,¹ to prevent unfair and unreasonable roaming rates and practices foisted upon Radiofone's customers by other companies,² to ensure that dominant mobile radio providers have not been able to refuse roaming interconnection to small carriers like Radiofone³, and to ensure continued service to Louisiana consumers by protecting existing carrier investment. Additionally, the LPSC has used its good offices to investigate consumer complaints and respond more quickly on a local basis, and to prevent unreasonable discrimination by intercarrier predatory practices, including cross-subsidization between local exchange carriers (LEC) and their cellular subsidiaries or affiliates.

Radiofone respectfully submits that these LPSC activities, and the market which it regulates, meet the standards of Section 332(c)(3) of the Communications Act of 1934, as amended (the Act),⁴ and justify the retention of its existing authority.

¹ LPSC Petition at 16.

² Id. at 33.

³ Id. at 13.

⁴ 47 U.S.C. § 332(c)(3).

Radiofone disagrees, however, with the LPSC's suggestion that it may extend any form of rate of return regulation to CMRS providers. Such regulation is not even imposed on the monopolistic Bell Operating Companies (BOCs) at the federal level, is inappropriate for a competitive marketplace, and is an improper extension of existing regulation under the standards set forth in Section 332(c)(3) of the Act.

These points are discussed in turn.

II. THE COMMISSION HAS SATISFIED THE STANDARDS OF SECTION 332 OF THE ACT FOR RETAINING REGULATORY AUTHORITY

In order to retain its regulatory authority, the LPSC must show, pursuant to Section 332(c)(3) of the Act,⁵ that the CMRS market conditions "fail to protect subscribers adequately from unjust and unreasonable rates or rates that are unjustly or unreasonably discriminatory." The LPSC's Petition is replete with examples of such market anomalies that have been remedied by the LPSC.

The LPSC has exercised its regulatory authority over CMRS providers by addressing customer complaints, resolving inter-carrier disputes, remedying discriminatory rates, setting and approving interconnection rates, monitoring rates, and remedying unlawful and/or unwarranted practices.⁶ For example, when BellSouth Mobility began misapplying its corporate rates to individuals, Radiofone brought this matter to the attention of the LPSC.⁷ Radiofone needed LPSC intervention to prevent a disruptive dispute with BellSouth Mobility.

As another example, the LPSC interceded when the Louisiana 8 cellular provider

⁵ Id.

⁶ See LPSC Petition at 7.

⁷ Id. at 16. Radiofone also points out that Radiofone never misapplied any corporate rates.

overcharged subscribers for roaming service from Baton Rouge to New Orleans.⁸ The LPSC ordered Louisiana 8 to reduce its roaming charges and eliminate its daily charge.⁹

Additionally, when BellSouth Mobility refused to allow Radiofone's cellular customers to roam on its service, contrary to the terms of a contract between Radiofone and BellSouth Mobility, Radiofone complained to the LPSC¹⁰ and the LPSC promptly and efficiently interceded to ensure continuous service to the public.

Furthermore, the LPSC has satisfactorily resolved consumer complaints forwarded to it by the FCC.¹¹ Thus, by making such referrals, the FCC has permitted complaints by Louisiana consumers to be handled by the regulatory commission that is most in touch with the CMRS industry and the needs of the people of Louisiana.

In sum, the CMRS market in Louisiana does not adequately protect subscribers from unreasonable or discriminatory rates and practices. The LPSC repeatedly has been called upon by subscribers, by carriers, and by the FCC, to resolve such market disruptions. In view of the Commission's stated intent to forebear regulation, Radiofone will be left without a forum for resolution of these matters. Radiofone submits that the LPSC has justified its retention of its existing regulatory authority over CMRS providers.

Radiofone would like to correct some of the mis-statements made in the Petition concerning Radiofone's rates for cellular service. The LPSC suggests that the rates that BellSouth Mobility and Radiofone offer in New Orleans are virtually identical, and implies

⁸ Id. at 33. The Louisiana 8 situation was resolved prior to Radiofone's acquisition of that carrier. See also id. at 19.

⁹ Id. at 18-19.

¹⁰ Id. at 13.

¹¹ Id. at 9, Exhibits 12-14.

that the two carriers are engaged in "conscious parallel pricing."¹² However, to the extent that any rates are the same, they demonstrate not parallel pricing, but, as might logically be expected, vigorous competition. As soon as one carrier changes its rates, the other responds competitively in order to ensure that it does not lose any customers. Consumers are familiar with this phenomenon among competing gas stations, or grocery stores. Competition, not "conscious parallel pricing," is at work in determining the price of gasoline at competing stations, or the price of bread at competing grocery stores, just as competition determines the cellular rates offered by competing providers. And when the LPSC asserts that "it is highly unlikely that the cost to provide service is identical for the two companies,"¹³ the LPSC is incorrect in implying that the prices are based on cost. The prices are set by the competitive marketplace.

The effect of competition on pricing is further demonstrated by the examples which the LPSC miscategorizes as market division (although those allegations do not specify the providers at issue).¹⁴ The LPSC asserts that if Provider A and Provider B have different rates, they must be dividing the market.¹⁵ However, as discussed above, when two providers have the same rates, the LPSC asserts that the providers are engaged in conscious parallel pricing. The LPSC cannot have it both ways. The only correct conclusion from these observations about cellular pricing behavior is that the market is competitive, and the carriers are logically

¹² Id. at 28-29.

¹³ Id. at 29.

¹⁴ Id. at 29, 33.

¹⁵ Id. at 29, 33.

responding to market forces¹⁶ as the Commission anticipated when it originally decided to promote competition by licensing two carriers in each market. Indeed, the Commission has concluded that virtually all CMRS services are actually or potentially competitive with each other to some degree, and that the range of services that are deemed substantially similar for purposes of establishing comparable technical requirements should therefore be defined broadly. (See News release dated August 9, 1994 (Report No. DC-2638) reporting the Commission's Third Report and Order in GN Docket 93-252).

In sum, the CMRS market in Louisiana is very competitive, and the LPSC, to its credit, has contributed to this competition by exercising its regulatory authority when needed to correct any market anomalies and protect consumers. It should be allowed to continue to do so in the future.

III. THE COMMISSION SHOULD NOT AUTHORIZE THE LPSC TO REGULATE CMRS PROVIDERS ON ANY RATE OF RETURN BASIS

Although Radiofone supports the LPSC's retention of its regulatory authority, Radiofone opposes any extension of that authority to include any form of rate of return regulation. In its Petition, the LPSC noted that it has an open docket to consider regulating CMRS providers on a rate of return basis.¹⁷ Such regulation is not even imposed on the monopolistic BOCs at the federal level, and is an improper extension of existing regulation

¹⁶ Radiofone also would like to clarify two customer complaints noted by the LPSC. First, a customer complained about the fee for cancelling cellular service. *Id.* at 11. Radiofone charges a cancellation fee, which is provided for in Radiofone's LPSC accepted tariff, to customers who breach their service contracts. Just as landlords seek to have tenants comply with the terms of their leases, cellular carriers seek to have customers comply with the terms of their service contracts. Second, a customer complained about the lack of service to "certain areas of South Louisiana." *Id.* at 14. The customer likely was experiencing the limits on the cellular service areas as they existed in 1992. Radiofone certainly cannot be faulted for not providing service to the entire state.

¹⁷ *Id.* at 2 n.2.

The Commission has abandoned rate of return regulation for the BOCs because, in its view, the telecommunications market is increasingly competitive.¹⁸ In doing so, the Commission noted that although rate of return regulation is meant to be a surrogate for competition,¹⁹ it does not, in fact, replicate the dynamic process of a competitive market.²⁰ Rate of return regulation is thus inappropriate for the CMRS in Louisiana, because CMRS is not a monopoly service. The CMRS market in Louisiana includes cellular, SMR and IMTS, and likely will include PCS in the near future.²¹ Given the existence of CMRS competition, there is no need to employ rate of return regulation as a surrogate for competition.²² Moreover, the Commission has noted that when applied to cellular services in particular, rate

¹⁸ Second Report and Order (Policy and Rules Concerning Rates for Dominant Carriers), 5 FCC Rcd. 6786, 6790 (1990).

¹⁹ Further Notice of Proposed Rulemaking (Policy and Rules Concerning Rates for Dominant Carriers), 3 FCC Rcd. 3195, 3204 (1988) [hereinafter Price Caps FNPRM].

Rate of return regulation was used to ensure that the net return to the owners of the monopoly conformed to a competitive level and did not result in a "monopoly gain." Nelson Lee Smith, The Fair Rate of Return in Public Utility Regulation 16-17 (1932).

²⁰ Price Caps FNPRM, 3 FCC Rcd. at 3205.

No regulatory agency can acquire or use effectively the range of data which influence a competitive market, nor can regulators react to changing market conditions as quickly as the competitive process can. Charles F. Phillips, Jr., The Regulation of Public Utilities: Theory and Practice 174 (1993) (citing former FCC Commissioner Lee Loevinger).

²¹ See Telecommunications Task Force Report, LPSC Petition Exhibit 47 at 11. The LPSC's assertion that "there is not substitute service for cellular" does not take into account these other two-way mobile services. LPSC Petition at 29-30.

²² The Commission has noted that market-based pricing for cellular services appears to be based on the view that cellular is non-essential and that the dynamic nature of the cellular industry requires a regulatory framework that encourages continuing reinvestment. Market-based pricing is "directed toward enhancing competition rather than focusing on traditional rate of return methods used to regulate monopoly services." Notice of Proposed Rule Making (Bundling of Cellular Customer Premises Equipment and Cellular Service), 6 FCC Rcd. 1732, 1734 (1991).

of return regulation "could lead to pricing distortion, including possible higher prices, and circumvent competition-driven investment."²³ Thus, instead of forging the path toward increased competition in Louisiana, as the LPSC desires,²⁴ rate of return regulation could hinder its future development.²⁵

Moreover, the Commission, has addressed the potential for cross-subsidy of services subject to rate-of-return regulation. In 1989, in proposing to eliminate FCC review of BOC cellular capitalization plans, the Commission stated that existing safeguards could help prevent cross-subsidy between cellular services and regulated services:

We recognize, of course, that other regulated communication services should not subsidize cellular services. We believe that existing federal and state requirements, other than our cellular capitalization plan requirements, adequately protect against cross-subsidization. In particular, it appears that our requirement that the RBOC's maintain separate books of account for their cellular subsidiaries, in conjunction with complementary state regulation, will facilitate detection of any attempt to allocate the costs of cellular services to other regulated services. Similarly, our policy of focusing on the costs of the capital used to support regulated interstate services when we set interstate rates of return will help prevent the shifting of costs from cellular services to other regulated communication services. Therefore, we tentatively conclude that the elimination of our capitalization plan requirements would not adversely affect conventional wireline ratepayers.

Notice of Proposed Rule Making (Amendment of Section 22,901(d) of the Commission's Rules to Eliminate Commission Review of Capitalization Plans for Mobile Radio Cellular Systems), 2 FCC Rcd. 4598, 4599 (1987), adopted, Report and Order, 3 FCC Rcd. 3708, 3709 (1988)

²³ Notice of Proposed Rulemaking and Order (Petitions for Rule Making Concerning Proposed Changes to the Commission's Cellular Resale Policies), 6 FCC Rcd. 1719, 1725 (1991).

²⁴ LPSC Petition at 35 (goal of LPSC is to move toward full competition).

²⁵ Report and Order and Second Further Notice of Proposed Rulemaking (Policy and Rules Concerning Rates for Dominant Carriers), 4 FCC Rcd. 2873, 2940 (1989).

(capitalization plan not needed to detect cross-subsidization).

Additionally, the Commission addressed the possibility of cross-subsidization of cellular services (if they were made subject to rate of return regulation) with CPE, in its Notice of Proposed Rule Making (Bundling of Cellular Customer Premises Equipment and Cellular Service), 6 FCC Rcd. 1732 (1991), and in the corresponding Report and Order (Bundling of Cellular Customer Premises Equipment and Cellular Services), 7 FCC Rcd. 4028 (1992). In the Notice of Proposed Rule Making, 6 FCC Rcd. at 1734 (footnotes omitted), the commission stated:

In states where tariffs are required, it appears that there are no tariffs which require cellular carriers to price service according to rate of return principles. Rather, the states have allowed carriers to employ market-based pricing. The utilization of market-based pricing appears to be based on the view that cellular service is non-essential and that the dynamic nature of the cellular industry requires a regulatory framework that encourages continuing reinvestment. Such regulation also appears to be directed toward enhancing competition rather than focusing on traditional rate of return methods used to regulate monopoly services. Hence, we tentatively conclude that the lack of regulation of the cellular industry reflects the competitiveness of the industry and decreasing concern that carriers are using largely untariffed cellular service rates to act anticompetitively in the untariffed and unregulated cellular CPE market.

In the corresponding Report and Order, 7 FCC Rcd. at 4031 (footnotes omitted), the Commission stated:

The record reveals that cellular service is unregulated at the federal level and largely unregulated at the state level. Moreover, it appears that most of those states that do regulate cellular service do not exercise rate-of-return regulation. While the non-regulation of cellular services does not in itself demonstrate that the cellular service market is competitive, it does suggest that state PUC's have chosen not to regulate cellular service because they do not consider it a monopoly service. In addition, the lack of regulation based on rate-of-return principles, combined with the absence of monopoly status for cellular carriers, significantly reduces one important motive for carriers to bundle -- to build unregulated CPE costs into the service rate base and cross-subsidize at the expense of the subscriber. As the DOJ notes, "absent a guaranteed return on their cellular service investments, carriers cannot expect to recover CPE discounts by including it [the amount of the CPE discounts] in their rate base." We agree with this conclusion.

The Commission's conclusions appear to follow comments filed by the Bureau of Economics of the Federal Trade Commission, 1991 FCC LEXIS 4535, at *36-*37 (footnotes omitted):

[T]he potential for a monopolist subject to binding rate-of-return regulation to use an unregulated product to "pad" its rate base has been noted in the economic literature. Such cross-subsidization can lead to higher prices in the regulated market, and inefficient production in the unregulated market.

It is not clear that such concerns provide a basis for having an antibundling rule at the federal level. As noted in the NPRM, cellular service is not regulated at the federal level, and is largely unregulated at the state level. In addition, for those states with regulation, utilization of regulation based on rate-of-return principles is not common. If rate-of-return principles are not being used, then the distortions from the cross subsidy, which are caused by use of rate-of-return regulation, will not be present. And even if some states employ rate-of-return regulation, antibundling regulation can be limited to and enforced by those states that choose to have rate-of-return regulation.

Indeed, imposing rate of return regulation would be taking a step backward in regulatory evolution. The Commission has long since foregone rate regulation of radio common carriers in order to avoid imposing needless costs upon the carriers, the Commission and ultimately, the public.²⁶ The Commission recognized that "competitive market forces work to secure many, if not all, of the same benefits that Title II was designed to obtain -- namely, an economically-efficient distribution of communications services at cost-based, non-discriminatory rates."²⁷

The Commission reaffirmed this position when it decided to forbear from applying Section 203 of the Act to CMRS. The Commission stated that although the cellular service marketplace had not been found to be fully competitive, "there is no record evidence that

²⁶ See generally Dean Burch, Common Carrier Communications by Wire and Radio: A Retrospective, 37 Fed. Comm. L.J. 85, 100-01 (1985) (discussing FCC's forbearance policies).

²⁷ Id. at 100.

indicates a need for full-scale regulation of cellular or any other CMRS offerings."²⁸ The Commission noted that cellular carriers do face some competition and the strength of that competition will increase in the near future. Also, the Commission stated that the continued applicability of Sections 201, 202 and 208 of the Act would provide protection in the event there is a market failure.²⁹

The Louisiana laws analogous to Section 201, 202 and 208 of the Act -- La. Rev. Stat. Ann. §§ 45:1163, 45:1176, 45:1502-04³⁰ -- are the foundation for the LPSC's past rate regulation, which Radiofone submits should have continued effect. However, as the Commission decided that full-scale rate regulation of CMRS is not needed, Radiofone similarly submits that rate of return regulation of CMRS in Louisiana is not needed, and at worst, could harm competition in the CMRS market.

Finally, the LPSC has not met the procedural requirements for obtaining authority to employ rate of return regulation under Section 332 of the Act,³¹ and Section 20.13 of the Commission's Rules.³² In particular, the LPSC has not identified and described in detail the rules it would use for rate of return regulation.³³ Thus, the Commission should forbid the LPSC from imposing rate of return regulation on CMRS providers.

²⁸ Second Report and Order (Implementation of Sections 3(n) and 332 of the Communications Act), 9 FCC Rcd. 1411, 1478 (1994).

²⁹ Id. at 1478-79.

³⁰ LPSC Petition Exhibits 5-7.

³¹ 47 U.S.C. § 332.

³² 47 C.F.R. § 20.13.

³³ See 47 C.F.R. § 20.13(a)(4).

IV. FEDERAL PREEMPTION OF THE LPSC'S AUTHORITY TO REGULATE THE PROVISION OF INTRASTATE CMRS SERVICES IN LOUISIANA VIOLATES THE TENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

The Tenth Amendment of the United States Constitution provides that "[t]he powers not delegated to the United States by the Constitution nor prohibited to it by the states, are reserved to the States respectively or to the people." U.S. Const., Amend. X. The people of the State of Louisiana have exercised their constitutionally protected power through the LPSC. The LPSC is an agency uniquely created by the Constitution of the State of Louisiana with authority to regulate public utilities and common carriers within the State. Federal preemption of LPSC's authority to regulate intrastate services provided by CMRS carriers is an infringement of the sovereign authority of the State of Louisiana that the Tenth Amendment is intended to protect.

LPSC regulation of intrastate CMRS providers is essential in order for the State of Louisiana to protect its citizens from unreasonable and discriminatory rates and practices of the CMRS providers and to ensure that its citizens are provided with a convenient and reliable public communications system. Because of the fundamental nature of the public interest involved, LPSC regulation of intrastate CMRS providers lies at the core of the State's authority as a sovereign entity to promote the welfare of its citizens. Preemption of the State's authority in this area significantly interferes with key attributes of the State's sovereignty and impairs the State's ability to structure its operations in an area of traditional governmental functions. For these reasons, federal preemption of state authority constitutes constitutionally impermissible infringement upon the sovereignty of the State of Louisiana in violation of the Tenth Amendment.


CONCLUSION


For the foregoing reasons, Radiofone respectfully requests the Commission to grant

the LPSC the authority to continue its current form of regulation of CMRS providers.

However, to avoid harm to the developing competition in the CMRS market,³⁴ Radiofone respectfully requests the Commission specifically to forbid the LPSC from initiating any form of rate of return regulation for CMRS providers.

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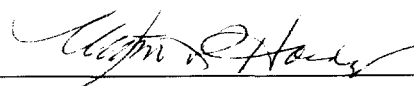
Dated: September 19, 1994

³⁴ The Commission has stated that it "has a long-standing policy of structuring regulation in a manner that both avoids any harm to developing competition and attempts to take advantage of the existence of competition in order to make regulation more effective." Price Caps FNPRM, 3 FCC Rcd. at 3270.

CERTIFICATE OF SERVICE

I, Ashton Hardy, hereby certify that on this 19th day of September, 1994, I caused to be mailed postage-prepaid, by U.S. first class mail, a copy of the foregoing "**Comments of Radiofone, Inc.**" to the following:

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